

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

In re the Matter of)
)
Complaint of SKY ANGEL U.S., LLC)
)
Against Discovery Communications,)
LLC *et al.* for Violation of the)
Commission's Competitive Access)
to Cable Programming Rules)
)

File No. CSR-8605-P APR 15 2010
Federal Communications Commission
Office of the Secretary

12-80

**MOTION OF DISCOVERY COMMUNICATIONS LLC
TO STRIKE UNAUTHORIZED PLEADING OF SKY ANGEL U.S., LLC OR, IN THE
ALTERNATIVE, RESPONSE TO EMERGENCY REQUEST**

Discovery Communications, LLC and Animal Planet, LLC (collectively, "Discovery") hereby move to strike the "Emergency Request for Immediate Grant of Petition" filed by Sky Angel U.S., LLC ("Sky Angel").^{1/}

The Commission's rules explicitly prohibit pleadings outside the schedule set by the Commission unless the party seeking to make the filing demonstrates "extraordinary circumstances."^{2/} Sky Angel did not seek the Commission's permission to file an additional pleading, nor did it attempt to make such a showing or even reference this rule in its filing. Instead, its nearly 70-page pleading, occupied mainly with new exhibits, largely reiterates the same arguments it made before. Under these circumstances, the pleading should be rejected.^{3/}

^{1/} Sky Angel Emergency Request for Immediate Grant of Petition (filed April 14, 2010) ("Emergency Request").

^{2/} 47 C.F.R. § 76.7(d).

^{3/} See, e.g., *Comcast Cablevision Corporation of California, LLC, Petition For Modification of the DMA Market of Television Broadcast Station KPTF-TV Farwell, Texas*, 17 FCC Rcd 15626, n.1 (2002) (rejecting an additional pleading under § 76.7 because it "failed to articulate the extraordinary circumstances required to support its consideration"); *Family Stations, Inc. v. EchoStar Satellite*

Should the Commission accept this pleading, the Commission should also find that extraordinary circumstances justify Discovery's instant response. In the absence of such a finding, Discovery will have no opportunity to respond to the new factual assertions raised in Sky Angel's impermissibly submitted pleading. The Commission's rules banning the raising of new arguments in responsive pleadings and the basic requirements of due process are designed to prohibit just this type of sandbagging.^{4/}

Discovery believes that the Commission has before it all of the information it needs to make an informed decision on Sky Angel's Emergency Petition for Temporary Standstill. Further, as detailed in Discovery's Response to the Emergency Petition, the Commission cannot grant the relief sought by Sky Angel because, as Sky Angel itself has acknowledged, the newly-established rule authorizing standstill relief is not in effect. However, to ensure the Commission is not misled by the "facts" that Sky Angel asserts are "in all likelihood"^{5/} true – but which are not, in fact, correct – Discovery submits these brief observations to correct misstatements and

Corporation; Request for Mandatory Carriage of Television Station WFME-TV, West Milford, NJ, 17 FCC Rcd 987, n.4 (2002) (same); *Family Stations, Inc. v. EchoStar Satellite Corporation Request for Mandatory Carriage of Television Station KFTL-TV, Stockton, CA*, 17 FCC Rcd 982, n.4 (2002) (same). See also *Mediacom Southeast LLC, Petition for Determination of Effective Competition in Various Alabama Communities*, 24 FCC Rcd 2398, ¶ 1 (2009) (rejecting an additional pleading under § 76.7 because it was "outside of the pleading cycle"); *Mediacom Southeast LLC, Petition for Determination of Effective Competition in Various North Carolina Communities*, 23 FCC Rcd 9964, ¶ 1 (2008) (same); *Thomas M. Schaefer d/b/a Strategic Video vs. Continental Cablevision Stockton, California, Lodi, California For Leased Access Channels*, 11 FCC Rcd 13898, n.2 (1996) (same). The public interest is clearly served by the Commission's consideration of this Motion, as Discovery is the only party situated to oppose Sky Angel's violation of the Commission's rules.

^{4/} 47 C.F.R. § 76.1003(f); see *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, ¶ 79 (1993) (in a program carriage proceeding, "[t]he complainant will not be permitted to submit new evidence or allegations in its reply"); *McBride v. Merrell Dow and Pharms., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (demonstrating similar rule in court proceedings). The same rationale extends to any responsive pleading.

^{5/} Emergency Request at 3.

clarify the true circumstances with respect to some of the representations made in the Emergency Request.

1. ***Sky Angel still fails to show that it is an MVPD under the rules.*** Sky Angel continues to assert that it is “certainly” an MVPD without addressing any of the substantive issues surrounding that definition,^{6/} and fails to explain why it does not conduct itself as an MVPD in its daily operations. Discovery’s reference to the closed captioning rules is not an “analog[y] to different rules, with different standards;”^{7/} rather, as Discovery already observed, the closed captioning rules explicitly define MVPD by reference to the program access definition.^{8/} If Sky Angel is not an MVPD for closed captioning purposes – which clearly appears to be the case since it has apparently not bothered to comply with those rules for many years – then it is by definition not an MVPD for program access purposes. Further, Sky Angel cannot transform itself into an MVPD by promising to comply with MVPD regulatory obligations such as closed captioning at some vague, future date.^{9/}

2. ***Discovery does not make its programming networks available by any distributor on the Internet as part of a transportable television service used in multiple locations.*** While Sky Angel argues that Discovery networks are available over Sprint mobile phones,^{10/} that argument is both wrong and irrelevant to Discovery’s concerns with Sky Angel’s service. Sprint is not an MVPD. It does not offer multiple “channels” of programming, nor does it offer “video programming.” Distribution of programming over mobile phones is not “comparable” to

^{6/} *Id.* at 5 n.12.

^{7/} *Id.* at 5.

^{8/} Opposition at 16 n.38; *see* 47 C.F.R. § 79.1(a)(2).

^{9/} Emergency Request at 5 n.13.

^{10/} *Id.*

broadcast television.^{11/} The mobile screen is a tiny fraction of the average television set and is intended for personal viewing only. It is certainly not a substitute for in-home television viewing. Discovery does not allow any distributor to offer subscribers the right to port their service to multiple homes for the payment of a single subscriber fee.^{12/} Sprint also does not use the public Internet to deliver Discovery's networks, and so its service does not implicate any of the risks posed by Sky Angel's service. Moreover, contrary to Sky Angel's assertion, Sprint is *not* currently offering any Discovery linear programming network; its service offers only select VOD content and other programming clips. Any comparison with services delivered by satellite to trucks and mobile homes^{13/} is inapposite for the same reason -- the programming is not delivered via the public Internet, and delivery to vehicles and mobile homes does not allow a subscriber to include multiple residences under one account.

3. *Discovery is a satellite-delivered programmer.* Noting Discovery's point that other satellite-delivered programmers are now better off by having chosen not to be part of the Sky Angel service, Sky Angel asks the Commission to heed the "clear implication that Discovery is closely aligned with 'satellite-delivered programmers with a national footprint.'"^{14/} From this statement and others,^{15/} Discovery can only conclude that Sky Angel does not understand the difference between satellite-delivered programmers and satellite distributors, or that Sky Angel is somehow reading "satellite-delivered programmers" to refer to DBS

^{11/} 47 U.S.C. § 522(20).

^{12/} See Opposition at 5-9.

^{13/} Emergency Request at 3.

^{14/} *Id.* at 6.

^{15/} See, e.g., *id.* (asserting that "Discovery has admitted that it is influenced by distributors with a national footprint" and that this "admission" demonstrates that Discovery is acting at DIRECTV's behest).

operators.^{16/} Discovery is not “aligned with” a satellite-delivered programmer, it is a satellite-delivered programmer. Discovery’s point is only that other satellite-delivered programmers chose not to be part of the Sky Angel service, and the Commission should not set a precedent that makes Discovery worse off for agreeing to attempt the affiliation than it would have been had it simply refused to enter into the affiliation agreement in the first place.

4. ***Discovery’s affiliation with Sky Angel was an experiment.*** The extensive due diligence conducted by Discovery regarding the nature of Sky Angel’s distribution network underlines the experimental nature of the affiliation.^{17/} Sky Angel carefully parses that it does not make available programming via the Internet.^{18/} But it does not deny that it uses the Internet to distribute its programming. No other distributor of Discovery’s linear programming networks uses the Internet as the distribution path to end users, which was precisely why Discovery considered the affiliation to be an experiment. And no other distributor of Discovery’s linear programming networks advertises, as Sky Angel does, that a subscriber may access its service wherever it can acquire a broadband Internet connection -- which is what raises the concern that Sky Angel’s offering is the functional equivalent of an Internet service and hence prompted Discovery to terminate the experiment.

5. ***Sky Angel’s complaint is time-barred.*** While Sky Angel may consider the Commission’s statute of limitations rules for program access complaint to be “silly,”^{19/} it cannot escape their applicability here. The amount of time elapsed since Discovery conveyed its intent

^{16/} As the Commission well knows, “satellite delivered” programmers are those programming networks delivered to distributors by satellite, rather than terrestrially, and the term is the operative one in the program access law. 47 U.S.C. § 548.

^{17/} Cf. Emergency Request at 2.

^{18/} *Id.* at 3.

^{19/} *Id.* at 5.

to terminate is not the relevant period for assessing whether the claim is time-barred. Sky Angel acknowledges that the operative affiliation agreement here was consummated in October 2007. To the extent that Sky Angel believed that it was “unfair” or “discriminatory” for Discovery to insist upon including a broad right of termination in that affiliation agreement -- which is clearly the gravamen of its complaint --, Sky Angel was obliged by the Commission’s rules to proffer that challenge within one year of entering into the affiliation agreement. Having failed to do so, Sky Angel’s complaint -- and attendant emergency request -- must be dismissed.

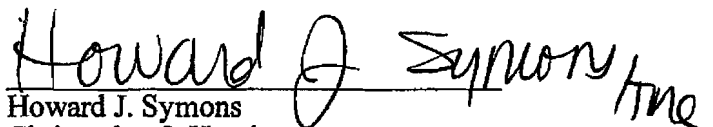
6. *Discovery has not refused to “cooperate” with the Commission.* Sky Angel characterizes Discovery’s reiteration that it will terminate its affiliation with Sky Angel on April 22 as a refusal to cooperate with Commission staff.^{20/} Commission staff, however, did not ask Discovery to extend the termination date it had set in its January letter notifying Sky Angel of termination; it simply asked whether Discovery intended to do so in light of the Complaint. Discovery’s counsel stated during the April 1, 2010 status conference between Sky Angel and Discovery that it did not believe Discovery intended to extend the termination date, and counsel later confirmed that decision as requested by the Commission. That Sky Angel has refused to heed these repeated confirmations and has failed to plan for the loss of the Discovery networks is not a sign of refusal to cooperate nor a reason to stay the termination.^{21/}

^{20/} *Id.* at 6-7 (see also cover e-mail transmitting same).

^{21/} Indeed, if Sky Angel had not waited for more than two months after receiving the termination letter to file its Complaint, it may not have required a standstill to complete the proceeding prior to that date.

For all these reasons, Sky Angel's Emergency Request should be stricken or denied.

Respectfully submitted,

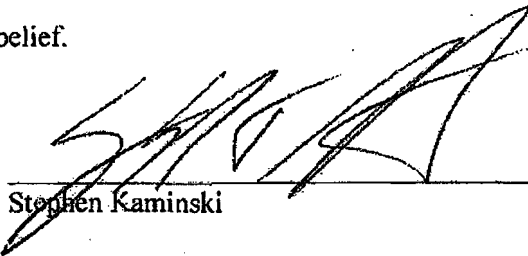
The handwritten signature of Howard J. Symons is written in black ink. It features a stylized 'H' and 'S' that are connected, with the first name 'Howard' and last name 'Symons' clearly legible. A horizontal line is drawn across the signature, and the word 'The' is written in a cursive script to the right of the line.

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 434-7300

April 15, 2010

VERIFICATION

I, Stephen Kaminski, Vice President, Legal Affairs, Discovery Communications LLC, have read the foregoing "Motion of Discovery Communications, LLC To Strike Unauthorized Pleading of Sky Angel U.S., LLC, Or, In The Alternative, Response to Emergency Request" and hereby declare, under penalty of perjury, that the factual information contained herein is true to the best of my knowledge, information and belief.



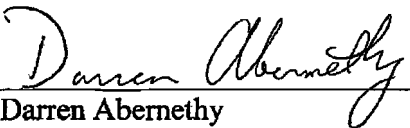
Stephen Kaminski

Dated: April 15, 2010

CERTIFICATE OF SERVICE

I, Darren Abernethy, do hereby certify that on this 15th day of April, 2010, a true and correct copy of the foregoing "Motion of Discovery Communications LLC to Strike Unauthorized Pleading of Sky Angel U.S., LLC Or, In The Alternative, Response to Emergency Request" was served by first class mail, postage prepaid, on the following:

Charles R. Naftalin
Leighton T. Brown II
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801


Darren Abernethy